03-1871

MARSHAL: PLEASE RISE . PLEASE B E SEATED .

CHIEF JUSTICE: WE APPRECIATE YOUR BEING READY TO GO AND WITHOUT ANY FURTHER ADO , ROLLMAN VERSUS STATE.

MAY IT PLEASE THE COURT. MY NAME IS DOUGLAS BRINKMEYER REPRESENTING MR . ROLLMAN . HE ENTERED A GUILTY PLEA T O ARMED ROBBERY, I N A DIRECT NEGOTIATION WITH THE JUDGE. THE JUDGE PROMISED HIM THAT HE WOULD RECEIVE A SENTENCE I N STATE PRISON, BETWEEN SIX AND TEN YEARS. THE PURPOSE OF HIM ENTERING THIS GUILTY PLEA WAS TO AVOID THE TEN-YEAR MANDATORY

YOUR POSITION IS THAT , AS I UNDERSTAND IT , THAT THE JUDGESAID A MAXIMUM OF TEN YEARS IN THE DEPARTMENT OF CORRECTIONS , AND BY MAKING THAT STATEMENT , IT EXCLUDE ED THE , ANY PROBATION . THAT I S YOUR POSITION.

THAT'S CORRECT.

NOW, THE IDEA OF PROBATION WAS NOT DISCUSSED , ONE WAY OR THE OTHER , CORRECT?

THE WORD PROBATION , WASNEVER MENTIONED .

AND SO WE WOULD HAVE TO IMPLY FROM WHAT WAS SAID , THAT HE MEANT NO PLOB ATION .

NO PROBATION.

I DON'T THINK YOU HAVE TO IMPLY IT. THAT IS THE WORDS THAT HE USED. THE OVERALL EFFECT WAS THAT MR. ROLLMAN BE SENTENCED AS A YOUTHFUL OFFENDER , IN ORDER TO AVOID THE TEN-YEAR MANDATORY.

YOU ARE NOT ASKING THIS DEFENDANT NEVER SOUGHT FOR THE PLEA TO BE WITHDRAWN.

THAT'S CORRECT .

IN FACT, YOU DON'T WANT TO WITHDRAW IT.

THAT'S CORRECT.

YOU ARE ASKING FOR SPECIFIC PERFORMANCE .

THAT'S CORRECT .

COMMITTEE WE TOUCH ON, THIS SEEMS TO CAN WE TOUCH ON , THIS SEEMS TO BE A CONTINUING PROBLEM FLOWING FROM WARNER , AND WARNER COMMITTED A FLOW OF HONESTLY ANSWERING QUESTIONS , WHEN A DEFENDANT AND A DEFENDANT'S COUNSEL MAY INQUIRE, AS TO WHAT THE COURT'S THINKING IS WITH REGARD TO A POSSIBLE SENTENCE. IS THIS JUST ANOTHER EXAMPLEHE WILL NOW , THAT WARNER IS JUST NOT WORKABLE , BECAUSE PEOPLE WON'T APPLY COMMON SENSE , AND WE GET INTO THE PROBLEMS THAT FLOW FROM IT , SO MAYBE WE SHOULD RECEDE FROM WARNER?

JUSTICE LEWIS , YOU ARE AT WARNER .

I UNDERSTAND THAT IS , SIR , AND I AM VERY DISAPPOINTED WITH WHAT IS HAPPENING JUSTICE LEWIS , YOU WROTE WARNER.

I UNDERSTAND THAT , SIR , ANDI AM VERY DISAPPOINTED WITH WHAT I S HAPPENING.

YOU HAVE TWO OUTCOMES THAT YOU NEGOTIATE AS A JUDGE.

IT DOES HOT SAY THAT YOU NEGOTIATE DOES NOT SAY THAT YOU NEGOTIATE AS A JUDGE. IT PROPOSES QUESTIONS.

THERE IS A REVIEW AND COMMENT ON THE LAW BETWEENFOURTH AND THE FIFTH, AS TO WHETHER THE JUDGE COULD ACTIVELY PARTICIPATE IN NEGOTIATIONS.

I AGREE WITH THAT , COULD ACTIVELY RESPOND , YES, SIR.

NOW , THE PROBLEM IS , IN DAVIS, THIS COURT INDICATEDTHAT THE JUDGE SHOULD NOT BECOME DIRECTLY INVOLVED IN PLEA NEGOTIATIONS , AND IN WARNER , THERE IS TWO-WAYS TO READ. IT WAS UNANIMOUS OPINION T DID NOT OUTLAW THE PRACTICE. THE LAST PARAGRAPH, I BELIEVE, SAYS THAT THE JUDGE STILL HAS DISCRETION. IF HE WISHES TO ENGAGE IN DIRECT NEGOTIATIONS WITH - -

YOU WON'T FIND THE PHRASE "JUDGE ENGAGE IN NEGOTIATIONS ." YOU WILL FIND JUDGES CAN RESPOND AND ACTIVELY PARTICIPATE . BUT NOT TO NEGOTIATE. BECAUSE THE JUDICIAL SYSTEM DOESN'T NEGOTIATE.

WELL , QUOTING FROM THE LAST PARAGRAPH WHERE A TRIAL COURT AGREES TO BE AN ACTIVE PARTICIPANT IN THE NEGOTIATING , WHERE THE TRIAL COURT ASSUMES SUCH A ROLE , AND THIS IS INDISCRETION TO THE JUDGE. I ASSUME THAT THIS COURT DID NOT OUTLAW THE PRACTICE T LEFT IT UP TO THE JUDGE'S DISCRETION.

BUT HAVE WE CREATED A MONSTER ? THIS WAS TO BENEFIT DEFENDANTS AS TO THE UNCERTAIN AS TO WHAT WOULD HAPPEN IF YOU WALKED INTO A COURTROOM , AND IT SEEMS TO BE FAILING IN THAT REGARD, AND I GUESS THAT IS WHAT I AM ASKING.

IF THAT IS TRUE , THEN IT HAS BACKFIRED , PARTICULARLY WITH REGARD TO MR . ROLLMAN.

HAVEN'T WE ALWAYS , THOUGH , WHEN THE TIME COMES FOR ACTUAL SENTENCING , STILL VESTED DISCRETION IN THE TRIAL COURT JUDGE , TO DETERMINE THE SENTENCE, EVEN IF HE HAS PARTICIPATED IN AN AGREEMENT BEFOREHAND , HOLDING THAT, IF THE JUDGE, NOW, HAS FELT THAT HE COULD NOT IMPOSE THE SENTENCE THAT WAS AGREED ON , THAT HE WOULD HAVE TO GIVE AN OPPORTUNITY TO THE DEFENDANT TO WITHDRAW THE PLEA , NOT THAT HE WOULD HAVE T O IMPOSE THE PLEA , THAT HAD EARLIER BEEN AGREED ON. ISN'T THAT THE LAW THAT EXISTED , FOR INSTANCE , BEFORE WARNER?

THAT'S TRUE. THAT IS WHAT HAPPENED IN DAVIS.

IS THERE ANYTHING IN WARNER THAT CHANGES THAT ASPECT OF OUR LAW?

UNDER THE TRADITIONAL SITUATION YOU JUST DESCRIBED , THE JUDGE MAY DECIDE A T SENTENCING HE CANNOT AGREE, BECAUSE HE HAS FOUND OUT SOMETHING IN BETWEEN THE PLEA AND THE SENTENCE , WHICH CAUSE HIM TO REJECT THE PLEA.

WHY DOES HE HAVE TO HAVE SOMETHING ELSE HAPPEN?

THAT IS THE NORMAL SITUATION.

I UNDERSTAND THAT THAT IS THE NORMAL SITUATION , BUT I GUESS MY QUESTION TO YOU IS THAT, EVEN IF WE ACCEPT YOUR VIEW THAT THIS IS UNAMBIGUOUS , THAT IS THAT A CAP OF TEN YEARS IN THE STATE PRISON, YOU KNOW, AND NOTHING ELSE , BECAUSE NOTHING ELSE WAS INCLUDED IN THAT DISCUSSION , WHY IS THE REMEDY NOT, AS WE HAVE HELD BEFORE , THAT, I F THE JUDGE NOW , WHEN THE SENTENCING ACTUALLY COMES UP, THAT THE DEFENDANT WILL BE PUT BACK AT SQUARE ONE. SQUARE ONE BEING HE CAN WITHDRAW THE PLEA , AND NOW HE FACES THE SAME CIRCUMSTANCES THAT HE FACED BEFORE . IN OTHER WORDS, I HAVE A LOT OF DIFFICULTY WERE WE NOW GO FROM WARNER AND THIS DISCRETION THAT NOW WE GO FROM DISCRETION T O WE ARE GOING TO BE INTERPRETING RECORDS , AS FAR AS WHAT SPECIFICALLY, WHAT THE DEAL WAS , AND THEN WE ARE GOING TO BE SPECIFICALLY ENFORCING YOU KNOW, THAT DEAL , BETWEEN JUDGES AND THE DEFENDANTS. WE HAVEN'T DONE THA T , I DON'T BELIEVE.

PAW WARNER ALLOWS JUDICIAL DISCRETION TO BECOME INVOLVED IN

LET M E

DIRECT NEGOTIATIONS .

LET ME ASK YOU THIS QUESTION. IF WE REJECT YOUR POSITION, THAT YOUR CLIENT IS ENTITLED TO SPECIFIC PERFORMANCE , WHAT WOULD YOU LIKE US TO D O AFTERDOING THAT? THAT IS ACCEPTING YOUR POSITION OTHERWISE BUT REJECTING THE REMEDY THAT YOU PROPOSED , DOES THE DEFENDANT HAVE A FALLBACK?

HE DOES NOT WISH TO WITHDRAW HIS PLEA. HE WILL ACCEPT THE TEN YEARS' PROBATION.

BECAUSE WHAT I , IN TERMS OF, WE ARE HERE ON A CERTIFIED QUESTION.

YES, MA'AM.

THERE ARE TWO PARTS OF IT, WHERE THE TRIAL COURT ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN TERMS OF A PLEA , THE TRIAL COURT MAY ACCEPT THE PLEA, AND ONCE IT IS SEND , MAY ANNOUNCE A MORE SEVERE SENTENCE , AND THAT IS THE SECOND QUESTION , IF THAT IS S O AND THE JUDGE CAN DO THAT , MUST TRIAL COURT AFFIRMATIVELY OFFER THE DEFENDANT AN OPPORTUNITY TO WITHDRAW THE PLEA , AND YOU ARE SAYING REALLY YOU WANT A THIRDQUESTION, WHICH IS "OR MUST SAY , REQUIRE THAT THEY CAN'T ANNOUNCE MORE , THAT THEY CAN'T ANNOUNCE A MORE SEVERE SENTENCE, THEN THERE HAS TO BE SPECIFIC PERFORMANCE ." SO IT SEEMS THAT YOU ARE CHANGING WHAT THE CERTIFIED QUESTION IS.

I DIDN'T WRITE THE CERTIFIED QUESTION. IT IS NOT WELL WRITTEN.

I MEAN , WE ARE HERE. IF THIS I S SOMETHING, I MEAN,IS THIS , LET ME ASK YOU, IS THIS SOMETHING THAT IS , REALLY , IN ANSWER TO , OR FOLLOWING UP WITH JUSTICE LEWIS SAID , SINCEWARNER , HAS THERE BEEN MORE PROBLEMS OF THIS NATURE? I MEAN , IN OTHER WORDS , ARE JUDGE S ENGAGING MORE ACTIVELY IN PLEA DISCUSSIONS , OR ISTHERE , CAN YOU, JUST FROM YOUR POINT OF VIEW TELL

I DON'T KNOW IF THERE HAVE BEEN MORE OR LESS.

YOU DON'T HAVE ANY SENSE OF THAT.

I DON'T EVER I DON'T HAVE ANY SENSE OF THAT I DON'T HAVE ANY SENSE OF THAT.

FIRST, WE HAVE GOT TO GETTO THE ISSUE AS T O WHETHER THEJUDGE , ENAGAIN, EVEN BY SAYING TEN YEARS, IF WE ACCEPT WHAT JUDGE PADOVANO SAID , THAT MEANT TEN YEARS IN THE DEPARTMENT OF CORRECTIONS. IT DIDN'T MEAN TEN YEARS, IT DIDN'T TALK ANYTHING ABOUT COST OR RESTITUTION O R PROBATION , AND IN BETWEEN THAT TIME , THERE WAS PSI.

YES, MA'AM. BUT THERE WAS NOTHING IN THE PSI THAT WAS UNKNOWN T O THEPARTIES OR DETRIMENTAL TO MR . ROLLMAN , AND YOU HAVE A SITUATION IN A LOT OF CASES, WHERE YOUR DEFENDANT MIGHT MISREPRESENT HIS RECORD AND SAY ILL ENTER A PLEA FOR TEN YEARS , ON THE CONDITION THAT I DON'T HAVE ANY PRIOR FELONIES , AND THE JUDGE SAYS FINE. IF YOU HAVE NO PRIOR FELONIES,YOU WILL GET TEN YEARS.

SEE , I GUESS I AM HAVING A PROBLEM , AND YOU KNOW , THERE WAS A SUBSEQUENT CASE AFTER WARNER, AND I DON'T REMEMBER THE NAME , BUT WHERE THE POSITION OF THE DEFENDANT WAS THAT , IF THE TRIAL COURT DIDN'T HONOR THE ORIGINAL OFFER OF SENTENCE BECAUSETHERE WAS SOMETHING ELSE THAT THEY WERE BOUND TO THE FIRST SENTENCE RATHER THAN THE SECOND SENTENCE , AND WE REJECTED. THAT WE SAID THE ONLY OPPORTUNITY IS TO ALLOW THEDEFENDANT TO WITHDRAW HIS PLEA , NOT TO BIND THE TRIAL COURT TO SOMETHING , AND I JUST ECOA CONCERN , BECAUSE I CERTAINLYJOINED IN WARNER , THAT IT SEEMS THAT , AS WE GO DOWN THIS PATH , THE MORE THAT THE TRIAL JUDGE WHO IS TRYING TO BE OF ASSISTANCE, ENDS U P , IF W E END UP HAVING A BLANKET POLICY THIS CAN'T OCCUR, IT SEEMS THAT IT IS THE DEFENDANTS THAT ARE GOING TO BE HURT B Y THIS , AND I HAVE ASKED THAT BEFORE , TO THE APPELLATE ATTORNEYS AND RATHER THAN JUST LOOK AT THE CASE IN FRONT OF YOU , IF YOUWANT T O REALLY THROW THE BABY OUT WITH THE BATHWATER, SO TO SPEAK.

IF YOU ARE TALKING ABOUT PUBLIC POLICY , TO ME IT IS MORE IMPORTANT , IF YOU HAVE A CONTRACT DIRECTLY WITH THE JUDGE, THAT THE CONTRACT BE ENFORCEABLE AS A MATTER OF PUBLIC TRUST.

BUT WE ARE, WELL , THAT MAYBE THE IMPLICATION OF THE FIRST DISTRICT OPINION , BUT I FIND THAT T O BE ACTUALLY OFFENSIVE , THAT WE WOULD PUT A JUDGE WHO WAS TRYING TO SAY , LOOK , I AM NOT GOING TO IMPOSE A 20-YEAR SENTENCE O R WHATEVER , A DEPARTURE SENTENCE, THEN WEHAVE GOT A 10-20-LIFE, SO THE STATE REALLY CAN'T TAKE A POSITION , THAT THE JUDGE IS TRYING T O ASSIST THE DEFENDANT. THIS DEFENDANT IS NO NO - - IS IN NO WORSE POSITION BECAUSEHE CAN WITHDRAW THE PLEA, BUTHE DOESN'T WANT TO DO. THAT TELL ME WHERE THE PREJUDICE IS TO THE DEFENDANT , AND I DON'T THINK I CAN HAVE A CONTRACT WITH A JUDGE , YOU KNOW, IN ALL DUE RESPECT TO YOUR POSITION.

WELL , THIS COURT, OTHER COURTS HAVE SAID , INCLUDINGTHIS COURT , THAT THERE IS A CONTRACT BETWEEN THE PARTIES WHEN A PLEA IS ENTERED.

LET ME ASK, I AGREE WITH JUSTICE PARIENTE THERE, THAT THERE IS NOT A , THE JUDGE IS NOT A PARTY TO THIS PROCEEDING BETWEEN THE STATE AND THE DEFENDANT, BUT EVEN IF WE ACCEPT THE ARGUMENT THAT IT IS A CONTRACT, DO YOU AGREE A FUNDAMENT PRINCIPLE OF CONTRACT, THERE HAS TO BE A MEETING OF THE MIND TO ALL OF THE ESSENTIAL TERMS OF THE CONTRACT.

AND THERE WAS.

STATUTE MANDATES , FOR ALL SENTENCES , RESTITUTION BE DETERMINED, COURT COSTS , FINES , AND OTHER THINGS , OTHER THAN WHAT WAS STATED IN THIS PLEA AGREEMENT OR OTHERWISE ARTICULATED , S O EVEN IF WE ACCEPT YOUR ARGUMENT, ISN'T IT TRUE THAT THERE IS NO MEETING OF THE MINDS BECAUSE THERE WAS NOT AGREEMENT TO ALL ESSENTIALTERMS OF ANY SENTENCE, AND THEREFORE THE REMEDY , IF THERE IS NOT A MEETING OF THE MINDS , IS TO PUT

THE PARTIES BACK INTO THE POSITION THAT THEY WERE BEFORE CONTRACT , WHICH IN THIS CASE, IS YOUR CLIENT'S RIGHT TO GO BACK TO TRIAL.

I DON'T THINK SO, BECAUSETHERE WAS A MEETING OF THE MINDS.

OF THE ESSENTIAL ELEMENTS?

YES, SIR.

DOESN'T THE STATUTE REQUIRE , IF NOT DISCRETIONARY , THE STATUTE REQUIRES I N EVERYSENTENCE, FOR THE JUDGE TO DETERMINE AN AWARD OF RESTITUTION , IS THAT CORRECT?

THE STATUTE DOESN'T REQUIRE PROBATION.

IT DOESN'T REQUIRE PROBATION, BUT IT REQUIRES THE CONSIDERATIONS OF FINES AND COSTS AND RESTITUTION , DOES IT NOT?

YES, SIR. IN MANY CASES , IF YOU RECEIVE A STRAIGHT PRISON TERM OF YEARS , YOU WILL NOT RECEIVE PROBATION AND THE STATUTORYFINES , RESTITUTION , COURT COSTS, ET CETERA, WILL BE ENTERED AS A CIVIL JUDGMENT AGAINST THE DEFENDANT BUT NOT AS A CONDITION OF PROBATION , WHICH WAS NOT CONTEMPLATED.

DO YOU AGREE THAT THERE WAS NO MEETING OF THE MIND BETWEEN THESE PARTIES

NO, SIR.

- - AS TO RESTITUTION , COURT COSTS OR FINES.

THOSE MARRIES WERE NOT MENTION THOSE MATTERS WERE NOT MENTIONED. HOWEVER , AS YOU POINTED OUT , THEY WERE REQUIRED , SO THE PARTIES MUST HAVE REALIZED THAT THEY WERE REQUIRED, AND IN MANY CASES WHERE A STRAIGHT PRISON SENTENCE IS IMPOSED WITHOUT PROBATION TO FOLLOW , THOSE MATTERS ARE ENTERED AS JUDGMENTS AGAINST THE DEFENDANT , AND IF HE EVER COMES INTO ANY MONEY, THE STATE CAN COLLECT IT.

BUT WHAT DO YOU HAVE WITH A JUDGMENT, FOR INSTANCE , HAS SORT OF THE SAME VIEW THAT JUDGE PADOVANO HAS , AND THAT IS WHEN SENTENCING COMES UP , AND NOW THE JUDGE SAYS, WELL , I AM SORRY , W E HAD A MISUNDERSTANDING, THAT I NEVER INTENDED, WHEN I AGREED TO A CAP ON THE PRISON TIME , T O EXCLUDE MY ABILITY TO ADD PROBATION , AND I AM SORRY , AND I APOLOGIZE IF YOU THINK I UNDERSTOOD THAT I WAS LIMITING MYSELF IN THAT REGARD , BECAUSE I WASN'T. THAT IS THAT AT ALL TIMES , I THOUGHT THAT I STILL HAD THEOPTION , YOU KNOW , TO DO THAT. OBVIOUSLY IF I DIDN'T THINK I HAD THE OPTION TO COME IT , I WOULDN'T TO DO IT , I WOULDN'T DO IT. HOW CAN YOU HAVE A, QUOTE , MEETING OF THE MINDS , WASTHERE ANYTHING WRITTEN ENTERED IN THIS CASE?

YES, SIR.

AND DID THE JUDGE SIGN THE WRITING?

I DON'T RECALL IF HE SIGNED IT, BUT THE

WELL THAT, IS WHAT WE ARE TALKING ABOUT PARTIES ARE BOUND BY SOMETHING.

THERE WAS A PLEA AGREEMENT. THERE WAS A WRITTEN PLEA AND SENTENCING AGREEMENT. IT IS ENTITLED

ISN'T THE OTHER SIDE O F THIS , THOUGH, IS REALLY THE POLICY ISSUE THAT WE ARE GOING TO COME BACK TO, IS THAT A JUDGE THAT NOW SEES THAT THEY , THAT THIS THING ABOUT A MISUNDERSTANDING OR WHATEVER,AND THAT THEY ARE GOING TO BE IN ESSENCE NAILED , BY THIS

THAT IS WHAT I AM SAYING.

AND THESE JUDGES ARE GOING TO SAY I AM SORRY . BUT I F THIS IS WHERE WE ARE HEADED , THEN I AM GOING TO ADOPT A STRICT POLICY OF SENTENCING.

THAT'S FINE.

AND SO , AND SO THAT ISFINE.

THAT IS WHAT I SAY. IF THIS COURT GOING TO GIVE DISCRETION TO THE JUDGE TO SAY EXERCISE TO BECOME ACTIVE PARTICIPANTS, THEN THEY DO S O AT THEIR PERIL.

ALL RIGHT. LET M E ASK SOMETHING BEFORE YOU SIT DOWN. IN THIS CASE , OTHER THAN GIVING UP THE RIGHT TO A TRIALBY JURY , WHICH IS INHERENT I N ANY PLEA , WHAT DETRIMENT TO RELIANCE DO YOU ALLEGE THE DEFENDANT HAD , AFTER ENTERING INTO THE PLEA?

AS THE FIRST DISTRICT NOTED , IF HE EVER VIOLATES PROBATION , HE WILL BE SUBJECT TO A LIFE SENTENCE.

WELL , I AM NOT TALKINGABOUT THE PROBATION. I AM SAYING IN SOME CASES LIKE CHARISS, WE SAY WHERE THE DEFENDANT HAS BEGUN TO PERFORM THE AGREEMENT , HE HAS ALREADY COOPERATED WITH THE STATE, TESTIFIED AGAINST THE CODEFENDANT OR SOMETHING LIKE THAT, WHERE YOU CAN'T PLACETHE PARTIES IN THE POSITION THEY WERE BEFORE THE PLEA AGREEMENT , AND IN THAT CASE , WE MAY REQUIRE SPECIFIC PERFORMANCE TO THE AGREEMENT. ARE THERE ANY CIRCUMSTANCES IN THIS CASE THAT WOULD REQUIREUS TO DO SO?

ONLY THAT GIVING U P YOUR RIGHT TO TRIAL IS THE MOST FUNDAMENTAL RIGHT THAT A DEFENDANT HAS.

BUT IF WE, IF THE DEFENDANT IS ALLOWED TO WITHDRAW HIS PLEA, HE WILL OBTAIN THAT RIGHT TO A TRIAL BY JURY , WON'T HE?

HE DOES NOT WISH TO DO THAT.

I UNDERSTAND THAT BUT HE HAVE THE RIGHT TO DO IT, IF HE WANTED TO.

THAT'S TRUE. HE WILL HAVE THE OPTION.THE PROBLEM IS THE MAJORITY OF THE FIRST DISTRICT FOUND THAT THEY WERE BOUND BY THIS COURT 'S OPINION IN DAVIS, WHERE THIS COURT SAID THERE ARE ONLY TWO REMEDIES WHEN THERE IS A VIOLATION AFTER PLEA AGREEMENT.NUMBER ONE, WITHDRAW THE PLEA. NUMBER TWO , ACCEPT THESENTENCE AS AMENDED OR ANNOUNCED BY THE JUDGE. OUR POSITION IS THERE SHOULD BE A THIRD OPTION , SPECIFIC PERFORMANCE, WHERE THE AGREEMENT IS MADE DIRECTLY WITH THE JUDGE. IN THIS CASE, THE STATE TOOK NO PART IN IT. IN FACT , THEY OBJECTED TO IT . BUT THE JUDGE WENT AHEAD ANDDID IT ANYWAY. ONCE HE DID THAT , AND ONCE H E ANNOUNCED I WILL SENTENCE YOU TO STATE PRISON , MAYBE AS YOUTHFUL OFFENDER TO A MAXIMUM OF SIX YEARS OR MAYBE WITH A TEN-YEAR MANDATORY, ONCE HE SAID THAT , THAT WAS THE DEAL. THAT WAS THE BARGAIN. THAT WAS THE AGREEMENT. THE JUDGE NEVER ADVISED MR. ROLLMAN OF THE POSSIBILITY OF PROBATION.HE NEVER EVEN ADVISED HIM OF THE MAXIMUM SENTENCE THAT HE MIGHT RECEIVE, WHICH WAS LIFE.

WELL , THAT IS A GOOD ARGUMENT FOR WHY HE SHOULD BE ALLOW T O WITHDRAW HIS ALLOWED TO WITHDRAW HIS PLEA PLAE.

IT IS ALSO A HIS PLEA.

IT IS ALSO A GOOD ARGUMENT THAT IS HE ENTITLED TO SPECIFIC PERFORMANCE OF THE CONTRACT THAT HE HAD WITH THE JUDGE , BECAUSE THE JUDGE STATED ALL OF THE TERMS OF IT AND HE STATED IT AND THEREWERE NO TERMS LEFT UNSTATED .

IT MAY BE A CONCLUSION THAT YOU DRAW ON BEHALF OF YOUR CLIENT, BUT THIS COURT NEEDS TO LOOK BEYOND THAT , AS TO THE POLICY THAT IS, YOU KNOW, IF THERE IS ANY ADVANTAGE TO ALLOWING A JUDGE T O INDICATE THE SENTENCE , THAT HE OR SHE WOULD IMPOSE , THAT WE WOULD NOT , AS A COUNTERVEILING CONSIDERATION , WANT TO BIND THE JUDGE, IF THE JUDGEDECIDES THAT THAT IS NOT A PROPER SENTENCE , AND

I THINK THIS COURT MADE THAT POLICY DECISION LESS THAN FOUR YEARS AGO , IN WARNER. IN ALLOWING MR. CHIEF JUSTICE

IF YOU WANT TO SAVE ANY OF YOUR TIME FOR REBUTTAL .

DISCRETION. YES, SIR.

GOOD MORNING .

DIDN'T W E SAY, IF YOU WOULDINTRODUCE YOURSELF.

MAY IT PLEASE THE COURT. I AM THOMAS WIN AN OCCUR , REPRESENTING THE STATE OF FLORIDA I AM THOMAS WINAKUR , REPRESENTING THE STATE OF FLORIDA IN THIS CASE.

DIDN'T WE SAY THAT THERE ARE SUBSTANTIAL ADVANTAGE S NOW , TO HAVING THE JUDGE RESPOND OR PARTICIPATE IN MUCH THE WAYTHE JUDGE DID HERE IN THESE PLEA NEGOTIATIONS, THAT IT WOULD GIVE CERTAINTY, YOU KNOW , AND SOMETHING THAT WE COULD RELY O N MORE , AND SO WHY, LET'S ASSUME FOR THE PURPOSES OF MY QUESTION TO YOU THAT , WE READ THE PLEA COLLOQUY TO ABSOLUTELY LIMIT PUNISHMENT TO TEN YEARS IN THE STATE PRISON , AS THE MOST PUNISHMENT , AND THAT YOU WOULD AGREE THAT ADDING A PROBATIONARY TERM IS ADDITIONAL PUNISHMENT , BUT IN ANY CASE ASSUME THAT , THAT WE READ THAT, YOU KNOW , THAT WAY. WHY SHOULDN'T , HAVING READ ITTHAT WAY AND THERE BEING NO CHANGE IN CIRCUMSTANCES BETWEEN WHAT WAS IT, THREE MONTHS?

TWO MONTHS.

BETWEEN THE TIME OF THE PLEA , THAT HE ACTUALLY ENTERED , AND THE SENTENCE , THERE BEING NO CHANGE OF CIRCUMSTANCE I N THAT INTERVENING TIME , WHY SHOULDN'T WE , IN LIEU O F OUR ANNOUNCEMENT IN WARNER , THEN , SPECIFICALLY REQUIRE THE JUDGE TO HONOR THE RESTRICTIONS THAT THE JUDGE , HIMSELF , AGREED TO , ON THE RECORD? AS I SAY , I AM ASSUMING IN THAT , THAT W E READ THIS TO LIMIT THE PUNISHMENT T O TEN YEARS , AS FAR AS NO OTHER PUNISHMENT WAS MENTIONED ON THE RECORD.

YES. THAT'S CORRECT. ASSUMING STRICTLY ARGUING THAT CONDITION.

RIGHT.

I WOULD SAY THAT IT IS TRUE THAT WARNER DID SUGGEST , AND STATE EXPLICITLY , THE JUDICIAL INVOLVEMENT AND PLEA NEGOTIATIONS , DOES HAVE ADVANTAGES, BUT AS JUSTICE LEWIS , WHO AUTHORED WARNER , POINTED OUT , THAT INVOLVEMENT WAS SIMPLY DESIGNED TO

GET THE INPUT IN THE PROCESS TO ANSWER THE DEFENDANT'S QUESTIONS. THAT TENDS TO PROMOTE EFFICIENCY IN THE PLE A PROCESS. IT WAS NEVER INTENDED TO ALLOWTHE COURT TO ENGAGE IN DIRECT NEGOTIATIONS.

BUT IT WASN'T JUST DEFICIENCY. YOU KNOW, W E SAID CERTAINTY AND CLARITY OR WHAT , YOU KNOW, WE ACTUALLY ARTICULATED , REALLY , THE VERY OPPOSITE OF WHAT HAS APPEARED TO HAVE OCCURRED HERE. THAT IS THAT WE END UP WITH UNCERTAINTY AND SO I GUESS IAM TRYING TO SAY, IT THAT IS WHAT WE WERE DOING WAS SAYING,WELL , IF THE JUDGE WILL BE ABSOLUTELY CLEAR, THEN , ABOUT WHAT I S GOING TO HAPPEN, AND BECAUSE IT IS THE JUDGE, THAT THERE SHOULD BE A GREATERASSURANCE , THAT THAT IS, THEN , WHAT WILL ACTUALLY HAPPEN , ISN'T THAT REALLY THE POLICY WE ANNOUNCE IN WARNER?

I DON'T AGREE THAT THAT IS THE POLICY ANNOUNCED IN WARNER. WELL , I THINK IT IS PART OF THE POLICY ANNOUNCED IN WARNER, THAT YOU ARE LOOKING FOR CERTAINTY AND EFFICIENCY IN PLEA NEGOTIATIONS , BUT I CERTAINLY WOULD NOT CONCEDETHAT THE POLICY ANNOUNCED IN WARNER WAS TO ALLOW THE JUDGETO MAKE SPECIFIC PLEA AGREEMENTS WITH DEFENDANTS.

WHAT WOULD HAVE HAPPENED IN THIS CASE , IF INSTEAD OF THE JUDGE , THAT WE HAD THE STATE AND THE DEFENDANT COME TO THE JUDGE , WITH A WRITTEN PLEA AGREEMENT, WHICH HAD YOU KNOW , WHICH WAS IN THE FORM THAT HAD ALL OF THE SAME THINGS THAT WE HAVE HERE ? YOU KNOW , AND THAT IS ALL IT WILL HAD , AND THE JUDGE APPROVED IT.

GENERALLY THE WRITTEN

NOW , WOULD , HOW WOULD WE TREAT THAT, IF , LATER , THE STATE SAID WE HAVE CHANGED OUR MINDS.WHAT WOULD HAPPEN IF THE STATE SAID WE HAVE CHANGED OUR MINDS AND WE HAD A WRITTEN PLEA AND THE STATE CAME IN AND SAID WE WANT TO COME IN AND ADD PROBATION TO THE THINING THIS.

JUSTICE - - PROBATION TO THE THING .

JUSTICE , ASSUMING THAT IT IS AS THE PETITIONER HERE CLAIMS , THE RULE IN SANTA BELLA WOULD ENTITLE THAT , AND SPECIFICALLY THEY WOULD BE ENTITLED TO SPECIFIC PERFORMANCE OF THE PLEA, IF THE STATE CHANGED HER POSITION WITH NO OTHER REASONS.

IS THAT BECAUSE THE STATEIS A PARTY TO THE ACTION AS A PRINCIPLE PAL .

AS A PRINCIPAL

ABSOLUTELY. AS A PRINCIPAL , THE STATE IS THE REPRESENTATIVE OF THE PEOPLE OF THE STATE OF FLORIDA.THE STATE IS A PARTY TO THEPROCEEDING. IT IS A PARTY TO THE PLEA AGREEMENTS. THE JUDGE IS NOT A PARTY TO A CRIMINAL PROCEEDING AT WHICHTIME IS NOT A REPRESENTATIVE OF THE PEOPLE OF THE STATE OF FLORIDA , AND AS THIS COURTSTATED IN BROWN , THE REASON THAT WE APPLY CONTRACT PRINCIPLES T O PLEA AGREEMENTS , IS BECAUSE THERE IS A MUTUALALITY OF ADVANTAGE, WHICH IS TRUE WITH, REALLY, ANY CONTRACTUAL RELATIONSHIP. THAT MUTUALITY O F ADVANTAGE SIMPLY DOES NOT EXIST , WHEN YOU ARE TALKING ABOUT AN AGREEMENT BETWEEN A CRIMINAL DEFENDANT AND A MUTUAL

LET ME ASK YOU THIS, HOWDID THE JUDGE GET INVOLVED IN THIS MATTER AT THIS POINT IN TIME? WHAT I HAVE READ TO DATE , THE STATE DID NOT MAKE AN AGREEMENT .

THAT'S CORRECT.

WITH THE DEFENDANT . AND S O THEY , HOW , UNDER WHAT SITUATION DID THE JUDGE BEGIN

TALKING ABOUT WHAT HE WAS GOING T O GIVE THE DEFENDANT, IF THE DEFENDANT MADE A PLEA?

THE ONLY INDICATION IN THE RECORD, JUSTICE WELLS , IS THAT THIS DISCUSSION OCCURRED DURING AN OFF-THE-RECORD BENCH CONFERENCE. THAT IS THE ONLY THING THAT WE CAN DISCERN FROM THE RECORD.

THEY WERE THERE ON SOME OTHER MATTER?

THEY WERE PROBABLY THERE ON THE CHANGE OF PLEA. A WEEK EARLIER, WE HAVE THAT WRITTEN AGREEMENT THAT PETITIONER'S COUNSEL REFERRED TO,, WHICH BY THE WAY , WAS NOTSIGNED BY ANYBODY EXCEPT PETITIONER AND HIS COUNSEL. IT WAS NOT SIGNED BY THE JUDGE. IT WAS NOT SIGNED BY THE STATE ATTORNEY. BUT IT WAS A WEE K PRIOR T O THE CHANGE OF PLEA HEARING , AND IT IS SET FORTH , THE TERMS EXACTLY AS THEY CAME OUT IN THE CHANGE OF PLEA HEARING A WEEK LATER. THERE IS NOTHING IN THE RECORD THAT I HAVE BEEN ABLE TO DISCERN, WHICH STATES WHERE THAT ORIGINAL AGREEMENT CAME FROM. SO IT IS UNKNOWN.

YOU DON'T HAVE ANYTHING ONTHE RECORD , AS FAR AS ANY DISCUSSION .

THAT'S CORRECT.

WHATEVER.

AND JUST SO THAT WE MAKE SURE WE HAVE THE WHOLE RECORD, THERE IS THE JUNE 12, 2002 , IS WHERE MR . GUISAL FOR THE STATE, SAYS THE COURT INDICATED WOULD CAP IT AT THE TEN-YEAR MINIMUM MANDATORY UNDER THE 10-20-LIFE. HOWEVER, THERE IS NO AGREEMENTWITH THE STATE. AND THE COURT , AT THE END OF THAT WHOLE COLLOQUY, SAYS TO THE DEFENDANT , WHEN HE IS DOING HIS PLEA COLLOQUY, YOUARE LIKELY TO GET BETWEEN SIX AND TEN , PROBABLY CLOSER TO TEN, BUT YOUR LAWYER IS GOINGTO ARGUE FOR SIX AND THE STATE IS GOING TO ARGUE FOR TEN . AND YES, SIR. AND THAT IS PART OF THE PLEA COLLOQUY, AND I THINK YOU AGREE THAT THIS DEFENDANT, AFTER THE TEN YEARS PLUS TEN YEARS' PROBATION WAS IMPOSED , HE WOULD HAVE HAD A RIGHT TO WITHDRAW HIS PLEA, BECAUSE NOTHING WAS MENTIONED IN THE PLEA COLLOQUY ABOUT PROBATION.

I WOULD CERTAINLY SUGGEST , YOUR HONOR, THAT IF PETITIONER HAD INDICATED ON THE RECORD THAT HE WISHED TO WITHDRAW HIS PLEA BECAUSE IT WAS HIS UNDERSTANDING THAT THE AGREEMENT INCLUDED A PROBATIONARY TERM , THEN CERTAINLY THE JUDGE WOULD HAVE PERMITTED HIM TO WITHDRAW HIS PLEA, AND THE STATE DOES NOT OPPOSE THAT.

WHAT HAPPENS TWO MONTHS LATER AND IT IS JUST A LITTLE STRANGE, IS MR . WEAVER , WHO REPRESENTS THE DEFENDANT, SAYS I AM ARGUING TO THE COURT THAT THE TEN YEARS' PROBATION , RESTITUTION , COURT COSTS, GOES BEYOND THE CAP. THE COURT HAD ALREADY ENTERED THE SENTENCE. THAT GOES BEYOND WHAT WAS ALREADY CONTEMPLATED. THE COURT.IT WILL BE NOTED. THEN THE COURT SAYS THAT , JUST FOR THE RECORD , THERE WASN'T ANY AGREEMENT IN THIS CASE WITH THE STATE. THE STATE RECOMMEND ED TWENTY YEARS INCARCERATION , AND THE COURT SAYS, NO , NO, AT THE TIME THE PLEA WAS ACCEPTED, THE STATE AGREED TO A TEN' YEAR CAP, AND BASICALLY THE COURT IS SAYING I DON'T ACCEPT PLEAS THAT ARE CAPPED , UNLESS THE STATE AGREES , SO EITHER, IT DOES , INSTEAD OF THEIR, IT APPEARS THAT THIS IS NOT A SITUATION WHERE THE COURT LEARNS SOMETHING DIFFERENT, BUT FOR WHATEVER REASON , WHETHER SOME OF THIS WAS OFF-THE-RECORD OR ON THE RECORD , THE COURT, WHETHER THE COURT SAID SOMETHING EARLIER , THE COURT LATER INDICATES THAT THE COURT WOULD NOT DO THAT, WITHOUT THE STATE'S AGREEMENT .

I AGREE WITH THAT CHARACTERIZATION, YOUR HONOR, AND I THINK THAT THE PROBTS THAT

YOU HAVE IDENTIFIED.

BUT IT IS THE SAME JUDGE.

IT IS THE SAME JUDGE. BUT THE PROBLEMS THAT YOU HAVE IDENTIFIED IN THE RECORD IN THIS CASE , I THINK , BEAR OUT THE PROBLEMS THAT YOU HAVE WITH JUDICIAL INVOLVEMENT AND PLEA NEGOTIATIONS IN THE FIRSTPLACE. THERE WAS NOTHING

CAN'T YOU SEE THE PROBLEMHERE? YOU HAVE AGREED THAT, IF THESTATE HAD SAID WE ARE GOING TO CAP THIS AT TEN , AND THERE IS AN AGREEMENT TO THAT EFFECT , THAT THEY, THEN , COME BACK AND ASK THE JUDGE FOR THE TEN YEARS OF PROBATION , AND THE JUDGE HAD ENTERED THAT, YOU WOULD BE ENTITLED TO SPECIFIC PERFORMANCE. THAT IS WHAT YOU INDICATED A LITTLE WHILE AGO , CORRECT?

IF I UNDERSTAND YOUR QUESTION CORRECTLY , JUSTICE QUINCE

YOU SAID STATE. IF THE STATE HAD DONE WHAT WAS DONE IN THIS CASE , THEDEFENDANT WOULD HAVE BEEN ENTITLED TO SPECIFIC PERFORMANCE , A S OPPOSED TO THE JUDGE HAVING DONE IT.

I WOULDN'T AGREE WITH THAT, ONLY BECAUSE THE STATE DOES NOT CONCEDE THAT THERE WAS ANY AGREEMENT AS TO ANY TERM OTHER THAN THE INCARCERATIVE PORTION OF THE SENTENCE .

BUT EARLIER , YOUR ANSWER TO JUSTICE ANSTEAD, YOU SAID THAT , IF THE STATE HAD DONE THIS , DESPITE WHETHER YOU BELIEVETHERE WAS A CAP OR NOT , THAT THE DEFENDANT WOULD HAVE BEEN ENTITLED TO SPECIFIC PERFORMANCE. AND SO WHAT I AM FINDING TROUBLING HERE, IS THAT WE HAVE A SITUATION WHERE WE HAVE SAID THAT JUDGES CAN, AT THEIR DISCRETION ENTER INTO THESE PLEA NEGOTIATIONS , AND YET THE JUDGE NOW HAS LED THIS DEFENDANT INTO A SENSE OF SECURITY , BY SAYING WE ARE GOING TO CAP THIS AT TEN YEARS. YOUR ARGUMENT IS SIX. YOU WILL PROBABLY GET THE TEN INSTEAD OF SIX. AND NOW THE DEFENDANT IS FACED WITH , REALLY , A HOBSON'S CHOICE. HE EITHER TAKES THAT WITH THE ADDITIONAL TEN YEARS ' PROBATION , OR WANTS TO WITHDRAW HIS PLEA AND THEN SUBJECTS HIMSELF TO THE ENTIRE TWENTY YEARS , AND SO DON'T YOU THINK THAT THERE IS SOMETHINGWRONG WITH THAT?

I DON'T THINK THAT THERE IS ANYTHING WRONG WITH THAT , YOUR HONOR, AND I WILL CONTINUE TO REPEAT MY ASSERTION THAT THE STATE DOES NOT BELIEVE THAT THAT IS WHAT OCCURRED IN THIS CASE WITH THE JUDGE. THE JUDGE DID NOT AGREE TO ALL TERMS OF SENTENCE.

BUT THE JUDGE , YOU CAN AGREE THAT THE JUDGE SAID THERE WILL BE A TEN-YEAR CAP.

AND THE JUDGE COMPLIED WITH THAT. I WOULD AGREE WITH THAT.

SO TEN YEARS OF PROBATION HAS NOTHING TO DO WITH A TEN-YEAR CAP?

THAT'S CORRECT , YOUR HONOR.

WHAT WAS THE MAXIMUM SENTENCE THAT HE COULD HAVE RECEIVED?

I BELIEVE THIS WAS THE FIRST-DEGREE FELONY, IN WHICH CASE THE MAXIMUM SENTENCE WOULD HAVE BEEN 30 YEARS.

LET ME ASK YOU , IN WARNER WE WERE DEALING WIT H A PLEA NEGOTIATION BETWEEN THE

STATE AND THE DEFENDANT. CORRECT ? AND THAT WAS A PLEA DPORB YEAS . PLEA NEGOTIATION.

I BELIEVE I N WARNER THAT THE COURT HAD INDICATED , SIMILAR TO THIS CASE, THAT, I N AN OFF-THE-RECORD DISCUSSION, THAT, IF THE DEFENDANT PLEADED GUILTY , THAT IT WOULD LIMIT ITS , LIMIT THE SENTENCE INSOME WAY.

THE TRIAL COURT HAD AGREED TO THAT.

THAT'S CORRECT.

SO THERE WASN'T AN AGREEMENT BY THE STATE IN WARNER?

I BELIEVE THAT THE STATE OPPOSED THE AGREEMENT , SIMILARTO WHAT THE STATE DID HERE.

OKAY.

AND I WOULD, ALSO , REMIND THIS COURT THAT THE WARNER MAY ACTUALLY HAVE VIOLATED WARNER,INASMUCH AS THIS COURT AFFIRMED THE FOURTH DISTRICT'S REVERSAL OF THIS CASE, WHICH THE FOURTH DISTRICT HAD REVERSED THIS CASE, BECAUSETHERE WERE SOME OTHER PROCEDURAL PROBLEMS WITH THE SENTENCE. THEY HAD IMPOSED A DOWNWARD DEPARTURE WITHOUT APPROPRIATE REASONS, AND THIS COURT SPECIFICALLY STATED THAT IT APPROVED THE FOURTH DISTRICT'S DECISION TO ANY EXTENT NOT INCONSISTENT WITH THIS COURT'SDECISION IN WARNER , AND IN A FOOTNOTE, IT STATED THAT IT WAS NOT CLEAR FROM THE RECORD, WHETHER THE TRIAL COURT HAD COMPLIED WITH THE RESTRICTIONS SET FORTH I N THE WARNER DECISION , BUT IT WAS NOT GOINGTO ADDRESS THOSE, BECAUSETHOSE WERE HARMLESS, BECAUSE THE SENTENCE WAS BEING REVERSED ANYWAY, S O EVEN THOUGH THIS CASE IS IN FACT , FACTUALLY SIMILAR TO WARN HE , THE STATE WOULD ASSERT THAT IT DOES NOT MEAN THAT WARNER WAS AN APPROPRIATE EXERCISE OF JUDICIAL PARTICIPATION AND PLEA NEGOTIATIONS.

LET ME ASK YOU THIS, IN SLIGHTLY DIFFERENT CIRCUMSTANCES , IF PART OF THE PLEA WAS THAT DEFENDANT WOULD COOPERATE WITH THE GOVERNMENT AGAINST CERTAIN CODEFENDANTS , AND THOSE CODEFENDANTS WENT T O TRIAL BEFORE THE SENTENCING . THE DEFENDANT TESTIFIED ON BEHALF OF THE GOVERNMENT, AND THEN THE JUDGE DID WHAT HAPPENED IN THIS CASE, SAYS I DIDN'T INTEND TO CAP EVERYTHING AT TEN YEARS. JUST INCARCERATIVE PORTION . AND THAT SITUATION, IF WE FOUND THAT THERE WAS AN INTENT TO CAP EVERYTHING AT TEN YEARS , COULD WE REQUIRE SPECIFIC PERFORMANCE ?

I THINK YOU COULD REQUIRE SPECIFIC PERFORMANCE IN THAT CASE, JUSTICE. THIS COURT HAS MADE IT CLEAR THAT, WHEN THERE IS IRREVOCABLE PREJUDICE , WHICH STEMS FROM AN AGREEMENT BETWEEN THE COURT AND THE DEFENDANT, WHERE THE DEFENDANT HAS DONE SOMETHING THAT , THEY HAVE BASICALLY PERFORMED THEIRPART O F ANY AGREEMENT THAT THEY HAD WITH THE COURT , THEN SPECIFIC PERFORMANCE IS AVAILABLE.I THINK THE CASE FROM 1977 PRESENTED A VERY SIMILAR SITUATION BUT THOSE ARE NOT CONTRACTUAL ELEMENTS THERE. THAT IS SIMPLY A FINDING BY THIS COURT THAT THE PREJUDICETO THE DEFENDANT IS TOO GREAT OF COUNTENANCE .

DID WE USE THE WORD SPECIFIC PERFORMANCE IN THAT CASE? SPECIFIC PERFORMANCE TO MEERTION HAS A CONTRACTUAL PERFORMANCE , TO ME , HAS A CONTRACTURAL

IF YOU ARE SPEAKING OF THE SHERIFFS CASE , I DON'T BELIEVETHE TERM SPECIFIC PERFORMANCE WAS ACTUALLY USED.

THERE IS SORT OF AN ESTOPPEL THERE, UNDER THE CIRCUMSTANCES , WHERE THE DEFENDANT

HAS ALREADY SUFFERED PREJUDICE ON HIS SIDE OF THE THING.

I THINK HE IS TOPPLE IS A VERY REQUEST G WAY TO PUT IT , MR . CHIEF JUSTICE .

I THINK JUSTICE PARIENTE MADE A VERY SPECIFIC POINTTHAT, IF WE ACCEPT THE DEFENDANT 'S POSITION IN THIS CASE, THAT FROM MY KNOWLEDGE WHAT GOES ON IN THE TRIAL COURT PLACES THE STATE AT A SPECIFIC DISADVANTAGE. THE STATE KIND OF STOOD B Y AND DIDN'T SAY ANYTHING , OTHER THAN I DIDN'T AGREE WITH IT. WHAT IS THE STATE'S POSITION , AS TO FROM THE STATE'S PERSPECTIVE , ISN'T THERE BENEFIT T O ALLOW THIS SORT OF PROCESS THAT WENT ON HERE , T O GO ON ? BECAUSE THE STATE , OFTEN , DOESN'T PUBLICLY WANT , AND IDON'T KNOW IF THAT IS WHATHAPPENED HERE, BUT SOMETIMES THE STATE, BECAUSE OF THE PRESSURE OF VICTIMS ANDOTHERWISE , MAY , THE PROSECUTOR MAY AGREE THAT , IN THIS CASE , HIS SENTENCE WAS JUST GIVEN IN THIS GUY'S CIRCUMSTANCES, BECAUSE OF PUBLIC PRESSURE AND OTHERWISE , CAN'T STATE IT ON THE RECORD , AND YOU HAVE THESE OFF-THE-RECORD DISCUSSIONS , AND YOU DO WHAT IS FAIR AND JUST UNDER THE CIRCUMSTANCE, AND EVERYBODY INTIMATELY INVOLVED, BUT BECAUSE O F PRESSURES ALL-AROUND , YOU CAN'T PUT IT ON THE RECORD. BUT JUSTICE IS DONE, AND MY CONCERN IS THIS WOULD, ALSO , TIE THE STATE , AND I JUST , IF YOU CAN COMMENT. IF YOU CAN'T , THAT I S FINE.

MY ONLY COMMENT, JUSTICE, WOULD BE THAT , WHILE UNCERTAINTHAT THAT IS TRUE IN SOME CIRCUMSTANCES THAT THE STATE DOESN'T WISH TO RECOMMEND ANY PARTICULAR SENTENCE O R ENTER INTO PLEA NEGOTIATIONS BECAUSEOF PUBLIC PRESSURE , I WOULD SAY THAT I T IS MORE LIKELY THAT THE STATE IS GOING TO BE SEVERELY DISADVANTAGED BY THIS PROCESS, WHERE THE COURT I S DEALING DIRECTLY WITH THE DEFENDANT AND COMPLETELY HAD LEAVING THE STATE OUT OF AND COMPLETELY LEAVING THE STATE OUT OF ANY NEGOTIATIONS. ANOTHER ISSUE HERE , AND I ACCEPT YOUR POINT THAT I DON'T SEE SPECIFIC PERFORMANCE BEING APPROPRIATE . BUT WE HAVE GOT A 20-YEAR-OLD DEFENDANT , WHO WAS UNDER MEDICATION WHEN THE DOCTOR FOUND HIM INCOMPETENT TO PROCEED FROM HIS , WHAT HE ANSWERS IN TRIAL , IN THE TRIALPROCEEDINGS , IT SEEMS LIKE HE IS , YOU KNOW , NOT QUITE ALL THERE . HE IS , AND UNDER THE GUIDELINES , IF THIS HAD BEEN BEFORE 10-20-LIFE , I THINK HE WOULD HAVE QUALIFIED FOR ABOUT 48 MONTHS, FOUR YEARS , SO SINCE HE HAS A GUN , HE IS AT TEN YEARS OR TWENTY YEARS , ANDMAYBE IT WAS USED ORAL EDGED, AND I KNOW THE STATE SUND THE STATUTE OR ALLEGED, AND I KNOW THE STATE IS UNDER THE STATUTE , THEY CAN'T AGREE T O THOSE THINGS, UNLESS THEY KEEP A RECORD OF IT , SO WE DON'T KNOW IN THIS CASE , BECAUSE IT IS A LOT OF OFF-THE-RECORD , IF THIS ISN'T A SITUATION WHERE, AS JUSTICE BELL SAID, THAT THE STATE UNDERSTOOD THAT THIS CASE SHOULD NOT GO TO TRIAL , THAT THIS WAS A YOUNG DEFENDANT WHO , YOU KNOW, MAYBE QUALIFIED FOR YOUTHFUL OFFENDER TREATMENT , AND SO THE COURTS ARE THE COURT IS WILLING TO SAY, WELL , I AM WILLING TO CAP IT, AND HE SAID LATER ON I WOULDN'T HAVE AGREED TO I T UNLESS THE STATE WOULD HAVE AGREED TO IT , HE MAY BE REFERRING TO SOMETHING THAT OCCURRED OFF THE RECORD BUT W E ARE SPECULATING HERE , BUT, AGAIN , WE ARE NAIVE TO SAY THIS SHOULD BE AN ALL OR NOTHING SITUATION. THAT JUDGE S , FIND TRIAL JUDGES ALL AROUND THE STATE , MAY FIND THEMSELVES IN A POSITION WHEREIT IS T O THE DWEST'S ADVANTAGE AND NOT TO THE DEFENDANT'SADVANTAGE AND NOT TO THE STATE'S DISADVANTAGE, TO INDICATE WHAT SENTENCE THEY WOULD IMPOSE. YOU , ARE YOU SAYING THAT THAT POLICY IS WRONG OR JUST CONSEQUENCES OF VARYING IT SHOULD JUST BE MINIMAL?

NOT AT ALL. THE STATE DOESN'T SUGGEST THAT THAT POLICY IS WRONG, AND THIS COURT HAS EXCLAIMING IN WARNER , THAT THAT POLICY IS GOING TO BE FOLLOWED, THAT IT DOES PROMOTE CERTAIN VALUES TO HAVE THE JUDGE INDICATE THOSE THINGS , BUT THAT DOES NOT, THE STATE JUST DOESN'T AGREE THAT THAT MEANS THAT THIS IS , THIS BECOME A S CONTRACTUAL OBLIGATION, BASED O N THAT .

THIS ISN'T A MOTION.

IT IS TRUE THAT THIS CASE DOES DEMONSTRATE SOME OF THE PITFALLS OF JUDICIAL INVOLVEMENT IN PLEA NEGOTIATIONS, BECAUSE THEREWAS NO WRITTEN AGREEMENT. I DON'T THINK.I HAVE YET TO SEE A WRITTEN AGREEMENT WHERE THE JUDGE ANDTHE DEFENDANT WERE PARTIES , AND THERE CERTAINLY WAS NONE HERE. THIS WAS ALL DONE ON THE RECORD, ON TRANSCRIPTS, ORALLY , AND SO WE ARE PRESENTED WITH THIS PROBLEM OF INTERPRETATION BETWEEN WHAT THE JUDGE MEANTBY CAP , AND A NATURAL

SHOULDN'T WE, AT THE VERY LEAST , REQUIRE THAT THERE WERE BENCH CONFERENCES THAT WERE NOT REPORTED , SHOULDN'T THOSE BE PART , IF THERE IS GOING TO BE SOMETHING IN WHICH THE JUDGE IS INVOLVED , SHOULDN'TTHOSE ALL BE ON THE RECORD?

NOT ONLY SHOULD THEY BE BUT WARNER REQUIRES THAT THEY BE.

SO THERE IS , ISN'T THERE A VIOLATION OF , DIDN'T THE JUDGE VIOLATE WARNER?

IT APPEARS THAT THE JUDGE DID VIOLATE WARNER IN THIS CASE. THE STATE DID NOT ARGUE THAT, EITHER AT THE TRIAL COURT OR REDISTRICT COURT AND ISN'TGOING TO MAKE THAT ARGUMENT HERE, BUT IT IS CLEAR THAT THE JUDGE'S VIOLATION OF WARNER IS PART OF THE REASON THAT WE ARE HERE TODAY , TRYING TO DISCERN INTENT FROM A TRANSCRIPT AT A CHANGE OF PLEA HEARING. IF THERE IS NO FURTHERQUESTIONS , THE STATE REQUESTS THIS COURT TO FIND THAT THE TRIAL COURT DID NOT FAIL TO FULFILL A PLEA-INDUCING PROMISE T O THE PETITIONER , BASED PRIMARILY ON THE SUGGESTIONS MADE BY JUSTICE BELL , DURING PETITIONER'S PRESENTATION , AS WELL AS THE OBSERVATIONS OF JUDGE PADOVANO IN HIS CONCURRING OPINION , JUDGE PAD A VAN -BEING MR. CHIEF JUSTICE

YOU ARE WELL OVER YOUR TIME. THANK YOU VERY MUCH. HOW MUCH TIME ON REBUTTAL? ONE MINUTE.

MR . BRINKMEYER, IF WE AREGOING TO ADHERE TO OUR DECISION IN WARNER , SHOULD THERE BE SOME MODIFICATION OR ARE YOU ADVOCATING SOME MODIFICATION, TO THE EFFECT THAT A JUDGE SHOULD AT LEAST PUT A CAVEAT ON HIS CAPPING AT TEN YEARS , TO SOME EFFECT OF WITHOUT , FLS UNLESS, FOR SOME REASON, SOMETHING COMES UP AND THE JUDGE WANTS TO CHANGE HIS MIND? WE ALREADY HAVE SOME CASE LAW TO THAT EFFECT?

I DISAGREE WITH JUDGE PADOVANO 'S OBSERVATION, EVEN THOUGH HE WAS A TRIAL JUDGEFOR A NUMBER OF YEARS, THAT THIS WAS CLEARLY THE CAP. IN M Y EXPERIENCE, A CAP MEANSTHAT THE JUDGE WILL SAY I WILL GIVE AWE CAP OF TEN YEARS IN PRISON. HOWEVER , THERE MIGHT BE SOME PROBATION TO FOLLOW.THERE WILL BE SOME PROBATIONTO FOLLOW. OR THERE WILL BE NOT ANY PROBATION TO FOLLOW.

LET ME PUT THIS I N CONTEXT. WAS THIS JUNE HEARING , WAS THAT A DOCKET DAY?

I HAVE NO IDEA. MY UNDERSTANDING IS THAT, WHEN MR. ROLLMAN WAS DECLARED INCOMPETENT TO PROCEED AND SENT OFF TO THE HOSPITAL , STATE HOSPITAL, HE CAME BACK , AND SPENT SOME SIX MONTHS IN THE STATE HOSPITAL, AND THEN SHORTLY AFTER THAT , I S WHEN THEY HAD THIS HEARING , ATWHICH TIME THE JUDGE FOUND HIM COMPETENT TO PROCEED , AND AT WHICH TIME THE JUDGE OFFERED HIM THE TEN -YEAR DEAL.

CHIEF JUSTICE: ALL RIGHT. THANK YOU VERY MUCH.

YES, SIR.

CHIEF JUSTICE: THANK YOU , BOTH, VERY MUCH , ESPECIALLY IN ENGAGING IN DISCUSSION WITH THE COURT ON AN IMPORTANTISSUE.THE COURT WILL NOW STAND IN RECESS.

MARSHAL: PLEASE RISE.